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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EVERTON ANTHONY WHITLEY,

Defendant and Appellant.

B220293

(Los Angeles County
Super. Ct. No. BA345898)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Charlaine F. Olmedo, Judge. Affirmed, remanded with directions.

Everton Anthony Whitley, in pro. per.; and Charles B. Holzhauer, under
appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Everton Anthony Whitley¹ appeals from the judgment entered following his conviction after a jury trial, on two counts of robbery and assault on a police officer. No meritorious issues have been identified following a review of the record by defendant's appointed counsel and our own independent review of the record and analysis of the multiple contentions presented by Whitley in a handwritten supplemental brief. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A foot pursuit following a traffic stop and collision with a patrol car on September 1, 2008, led to defendant's arrest for assault with a deadly weapon. A subsequent investigation resulted in defendant's arrest for robbing two hotel employees on August 30, 2008. An amended information charged defendant with two counts of second degree robbery (Pen. Code, § 211; count 1, Vardan Tigranyan; count 2, Manoj Vasandani).² As to both counts, it was alleged defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). Defendant was also charged with two counts of assault with a deadly weapon (a car) on a peace officer (§ 245, subd. (c); count 3, Marcus Moreno; count 4, Ruben Chavez), and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)). It was further alleged as to all counts that defendant had served a separate prison term for a felony (§ 667.5, subd. (b)).

Represented by appointed counsel, defendant pleaded not guilty to the charges and denied the special allegations. His motion to sever the robbery counts was heard and denied on December 8, 2008. Jury trial commenced on March 23, 2009.

¹ Although the record on appeal reflects defendant's surname is "Whitley," he gives his surname as "Whitely" in his supplemental brief.

² Statutory references are to the Penal Code.

Summary of Evidence Presented at Trial

The primary issue at trial was whether it was defendant who committed the charged crimes. According to the People's evidence, in the early evening of August 30, 2008, employees Manoj Vasandani and Vardan Tigranyan were working at the front desk of the Dunes Hotel in Los Angeles, when defendant approached and requested paper towels. After defendant was unable to verify his room number, they refused his request, and he left. About 30 minutes later, defendant returned and demanded cash at gunpoint from the two employees. Vasandani open the cash register and defendant retrieved the money, approximately \$400. Defendant demanded access to the hotel safe, but he left when Tigranyan told him he was being videotaped by the hotel security camera.³

Vasandani contacted police and described the robber's clothing and appearance. He also told officers the robber spoke with a strong Jamaican accent. Later, Vasandani and Tigranyan separately identified defendant as the robber from a six-pack of photographs assembled by police, although both noted defendant wore his hair in an Afro, while it was braided in the photograph.

On the night of September 1, 2008, Los Angeles Police Officers Marcus Moreno and Ruben Chavez were in their unmarked police car, when they noticed defendant driving a late-model minivan that was missing a front license plate. When the officers started following defendant, he accelerated the minivan to 45 miles per hour, exceeding the 25 miles per hour speed limit. The officers activated their lights and siren to initiate a traffic stop. Defendant briefly leaned towards the front passenger seat before stopping the minivan in the middle of the street. The officers pulled up about one car length behind defendant, who immediately began to accelerate the minivan in reverse towards the police car. Officer Moreno was in the process of getting out of the police car; Officer Chavez was standing behind the open front passenger door. The officers managed to get away from the police car before the minivan collided with it, causing the doors of the

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The hotel videotape of the robbery was played for the jury.

police car to slam shut and some front-end damage. Defendant jumped out of the minivan and fled towards nearby houses. The officers called for backup and then pursued defendant. He was found by police dogs in the vicinity of the first yard he entered. Inside the minivan was a handgun.

After defendant was arrested, Officer Carlos Guerrero, who was at the scene, noticed that defendant had a Jamaican accent, as did the robber of the Dunes Hotel employees. Officer Guerrero was among the officers who had responded to that August 30, 2008 robbery and spoke with the hotel employees.

Defendant's primary defense at trial was misidentification. Defendant waived his right to testify in his own defense. Tigranyan testified as a defense witness that he was not certain, and indeed had never been certain, defendant was the robber. But Tigranyan acknowledged to having identified defendant's photograph as the person who looked similar to the robber. Vasandani testified as a defense witness to having seen a scar on defendant's face, below his left eye. However, the officer who prepared the six-pack of photographs testified he did not see a facial scar in defendant's photograph. Defendant stood in front of the jury to afford the jury a close view of his hair as well as his face, which did not bear a scar. Michael Eisen, a psychologist and expert in eyewitness identification, testified as to the general unreliability of eyewitness identification. He explained suggestibility and false identification, including how stress and trauma experienced at the time of the event as well as information subsequently learned may affect memory and the accuracy of the identification.

Verdict and Sentencing

The jury convicted defendant of second degree robbery and being a felon in possession of a firearm as charged in counts 1, 2, and 5. The jury also found true the firearm-use enhancement as to both robbery counts. However, the jury found defendant guilty of assault on a peace officer (§ 241, subd, (c)), the lesser included offense of assault with a deadly weapon on a peace officer, as charged in counts 3 and 4.

Defendant waived his rights to a jury trial. Following a bench trial, the court found true the prior prison term allegation.

On October 8, 2009, the trial court denied defendant's motion for a new trial and sentenced him to an aggregate state prison term of 14 years: on count 1, the middle term of three years for second degree robbery, plus 10 years for the firearm-use enhancement; on count 2, a consecutive term of one year (one-third the middle term) for second degree robbery; on counts 3 and 4, concurrent terms of one year for assault on a peace officer; and on count 5, a concurrent term of two years for being a felon in possession of a firearm. Defendant was awarded 461 days of presentence credit (401 actual days and 60 days of conduct credit). The court ordered defendant to pay a \$30 security fee, a \$30 criminal assessment fee and a \$200 restitution fine. The court imposed and suspended a parole revocation fine pursuant to section 1202.45.

DISCUSSION

We appointed counsel to represent defendant on appeal. After an examination of the record, counsel filed an opening brief in which no issues were raised. On June 4, 2010, we advised defendant he had 30 days in which to personally submit any contentions or issues he wished us to consider. On June 23, 2010, we received defendant's handwritten brief in which he challenged his conviction and sentence on several grounds. Although none of defendant's claims presents an arguable issue, pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, 110, 120-121, we identify defendant's contentions and explain the reasons they fail.

Sufficiency of the Evidence to Support the Convictions for Robbery

The victims' testimony constituted substantial evidence that it was defendant who robbed the hotel employees. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) As he did in his motion for new trial, defendant argues the evidence to convict him was insufficient because Vasandani testified the robber had a scar, Tigranyan expressed uncertainty in his identification of defendant as the robber, and the defense expert presented reasons to discount eyewitness identification testimony. Defense counsel thoroughly cross-

examined the victims and vigorously argued to the jury that the identification testimony was not to be believed in light of the discrepancies and the expert witness's opinion. As the trial court noted, both victims identified defendant as the robber in the photographic lineup, at the preliminary hearing, and at trial. The jury also had an opportunity to view videotape of the robbery. Determining witness credibility is the exclusive province of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Nothing in the record suggests the testimony of either victim's testimony was inherently improbable or impossible. (See *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372.)

Motion to Sever

Defendant argues the trial court violated his constitutional right to equal protection of law in denying his motion to sever the robbery counts. The transcript of the hearing on the motion is not part of the record on appeal. In any event, apart from making this claim, defendant does not show how the denial of the motion amounted to an equal protection violation.

Probable Cause to Initiate a Traffic Stop

Defendant contends the officers lacked "probable cause" to pull him over because the fact his car had only a rear license plate, and it was from Arizona, did not violate any motor vehicle laws. Defendant has forfeited this claim by failing to litigate it by filing a motion to suppress. (§ 1538.5, subd. (m) ["Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of evidence."]; see *People v. Ledesma* (1987) 43 Cal.3d 171, 235-236 (conc. opn. of Mosk, J.)) In any event, defendant bases his contention on a misstatement of the evidence. The record reflects the reason for the traffic stop was defendant's excessive rate of speed, and not his missing license plate.

The Effect of Defendant's Misbehavior on the Jury

The record reflects defendant misbehaved on one occasion when he repeatedly interrupted a police officer's testimony, calling him a liar and a racist. Twice the trial court told defendant to refrain from engaging in emotional outbursts or he would be excused from the court room. The court also admonished defendant outside the presence of the jury and then instructed the jury to disregard defendant's statements. The trial court later denied the defense motion for mistrial because the jury heard defendant's Jamaican accent.

Defendant contends his emotional outbursts had a prejudicial effect on the jury. Significantly, defendant is not asserting the jury reacted against him because his outbursts were rude or alarming. (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 200-201.) Instead, defendant maintains he was prejudiced because his outbursts enabled the jury to hear his Jamaican accent, which was relevant evidence in this case. In any event, as the trial court correctly observed, defendant cannot complain of the effects of his in-court misbehavior, and thus can claim no reversible error on this ground. (*Id.* at p. 201, and cases cited therein.)

Sufficiency of the Evidence to Support the Convictions for Assault on a Peace Officer

As the jury in this case was instructed, "a defendant may be convicted of the lesser offense of assault on a peace officer where the People prove the defendant did an act that by its nature would directly, naturally and probably result in the application of force to a person." (CALCRIM No. 900.) Defendant contends the evidence was insufficient to support his convictions for assault on a peace officer because Officers Moreno and Chavez got out of their car before the collision. But the issue was not whether the act actually resulted in the application of force, but whether, by its nature, it would directly, naturally and likely result in force. (See, e.g., *People v. McDaniel* (2008) 159 Cal.App.4th 736, 748.) From the officers' testimony, the jury could have reasonably

inferred had the officers not escaped in time, they would have been struck by the doors of the police car, which slammed shut as a result of the impact.

Sentencing on the Enhancements

The record shows the trial court sentenced defendant to a consecutive term of one year (one-third the middle term) for second degree robbery as charged in count 2. However, the court failed to sentence defendant on the accompanying section 12022.53, subdivision (b) firearm-use enhancement. The trial court has no authority under section 1385 to dismiss the enhancement in furtherance of justice (§ 12022.53, subd. (h)). Accordingly, on count 2, the court could have imposed a consecutive term of four years four months, consisting of one year (one-third the middle term) for second degree robbery, plus three years four months (one-third the ten-year term) on the firearm-use enhancement. (§ 1170.1, subd. (a).) Alternatively, the court could have sentenced defendant to a concurrent term of 13 years on count 2 and the accompanying enhancement. We note the court also neglected either to impose the one-year prior prison term enhancement, or to dismiss it in furtherance of justice.

We have examined the entire record, with the exception of the aforementioned sentencing errors, we are satisfied defendant's attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly*, *supra*, 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

We remand for the limited purpose of resentencing and affirm the judgment in all other respects.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.